## Statement of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, On the Nomination of Gregory Phillips July 8, 2013

Our Constitution provides the Senate an important role to play in providing advice to the President and in voting on whether to confirm nominees for our third branch of government. Last month, we were reminded of the importance of these confirmation votes when the Supreme Court handed down several narrowly-decided opinions that are already impacting millions of Americans. As a senior member of this chamber, I have voted on the confirmation of every one of the nine justices currently serving. Since only a tiny percentage of cases brought in federal court ever end up at the Supreme Court, the Federal courts of appeal are often the courts of last resort for most disputes. I am glad that today we are finally voting to confirm another appellate nominee.

Before the Memorial Day recess, the Minority Leader asked during a floor debate when Gregory Phillips, the Wyoming nominee to the Tenth Circuit, would receive a vote. When the Majority Leader immediately offered a vote on that nominee, the Minority Leader demurred without giving any reason. Senate Republicans have now finally decided to allow the vote on Gregory Phillips to move forward, but there was no reason for this delay in his confirmation vote.

Gregory Phillips is currently the Attorney General of Wyoming, a position to which he was appointed by Wyoming's Republican governor. From 2010 to 2011 he worked in the Wyoming Attorney General's Office as the Special Assistant to the Governor for Legislative Affairs. Prior to working in the Wyoming Attorney General's Office, he was an Assistant U.S. Attorney in Wyoming, and spent 14 years in private practice. Attorney General Phillips has also served as a part-time Deputy County Attorney, an Assistant Municipal Judge and as a State Senator. Following law school, he served as a law clerk to the Honorable Alan B. Johnson of the U.S. District Court for the District of Wyoming. The ABA Standing Committee on the Federal Judiciary unanimously rated Mr. Phillips "well qualified," its highest rating.

At his Judiciary Committee hearing, Attorney General Phillips was introduced by his two Republican home state Senators, Senator Enzi and Senator Barrasso, both of whom strongly support his nomination. He was reported unanimously by the Judiciary Committee nearly three months ago. While his confirmation vote has not been delayed quite as long as votes on most of President Obama's nominees, he could and should have been confirmed last May when the Majority Leader offered.

With the confirmation of Attorney General Phillips, there will be 10 active judges on the Tenth Circuit. According to the most recent data, this means that the number of pending appeals per active judge on that court will drop from 150 to 135. I mention this because another appellate court, the D.C. Circuit, currently has 177 pending appeals per active judge. Despite that higher caseload, some Senate Republicans argue that the D.C. Circuit's caseload is too low, and that three of its judgeships should be eliminated. I suspect that many, if not all, of these Senators will vote to confirm Attorney General Phillips, even though his confirmation means that the Tenth Circuit will now have the lowest caseload in the country, just as earlier this year they supported

the confirmation of Jane Kelly to the Eighth Circuit, which gave that court the lowest caseload in the country, and just as they supported the confirmation of Robert Bacharach to the Tenth Circuit, which gave that court the lowest caseload in the country. I hope those Senators will reconsider their double-standard and not play politics with an independent branch of government.

Some of the same Senate Republicans who are opposing President Obama's three nominees to the D.C. Circuit are also criticizing him for making too few nominations and somehow claiming that many vacancies without a nominee cannot possibly be the fault of Senate Republicans. I recall that before President Obama made a single judicial nomination, all Senate Republicans sent him a letter threatening to filibuster his nominees if he did not consult Republican home state Senators. They cannot have it both ways.

I take very seriously my responsibility to make recommendations when we have vacancies in Vermont, whether the President is a Democrat or a Republican, and other Senators should do the same. After all, if there are not enough judges in our home states, it is our own constituents who suffer. It should be only a matter of weeks or months, not years, for Senators to make recommendations.

Unfortunately, in some states it appears as if there is no effort being made to recommend qualified nominees to the administration. There are three district vacancies in Georgia without nominees, and the oldest is over four years old. There are three district vacancies in Kentucky without nominees, and the oldest is over a year and a half old. There are seven district vacancies in Texas without nominees, and the oldest is over four and a half years old. Three months ago the Senators from Texas announced a nominations commission, but it is my understanding that it is still not accepting applications. If Senators want new judgeships in their states, they should be working especially hard to ensure that all existing ones are filled. Republican Senators who demanded to be consulted on nominations should live up to their responsibilities, and fulfill their constitutional obligation to advise the President on nominations. They should follow the example of Democratic Senators: the administration has received recommendations for all current district vacancies in states represented by two Democratic Senators.

Moreover, the failure of some Republican Senators to help fill vacancies in their own states does not excuse their unwillingness to complete action on the nominations the President has made. I regret that I must correct the record, again, on how Senate Republicans have obstructed judicial nominees over the past four years. The continued assertion by Senate Republicans that 99 percent of President Obama's nominees have been confirmed is not accurate. President Obama has nominated 243 individuals to be circuit or district judges, and 197 have been confirmed by the Senate. That is 81 percent, not 99 percent. By way of comparison, at the same point in President Bush's second term, July 8 of his fifth year in office, President Bush had nominated ten fewer people to be circuit or district judges, but had seen 215 of them confirmed, which is 18 more confirmations. The truth is that 92 percent of President Bush's judicial nominees had been confirmed at the same point, 11 percentage points more than have been allowed for President Obama. That is an apples to apples comparison, and it demonstrates the undeniable fact that the Senate has confirmed a lower number and a lower percentage of President Obama's nominees than President Bush's nominees at the same time in their presidencies.

I noted at the end of last year, while Senate Republicans were insisting on delaying confirmations of 15 judicial nominees that should have taken place in wrap up, we would not likely be allowed to complete work on them until May. That was precisely the Republican plan. So when Senate Republicans now seek to claim credit for their confirmations in President Obama's second term, they are inflating the confirmation statistics. The truth is that only 11 circuit and district confirmations have taken place this year that are not attributable to those nominations Senate Republicans needlessly held over from last year. To use a baseball analogy, if a baseball player goes 0-for-9, and then gets a hit, we do not say he is an all-star because he is batting 1.000 in his last at bat. We recognize that he is just 1-for-10, and not a very good hitter. Nor would a fair calculation of hits or home runs allow a player to credit those that occurred in one game to the next because it would make his stats look better.

If President Obama's nominees were receiving the same treatment as President Bush's, today's vote would bring us to 215 confirmations, not 198, and vacancies would be far lower. The nonpartisan Congressional Research Service has noted that it will require 29 more district and circuit confirmations this year to match President Bush's five-year total. Even with the confirmations finally concluded during the first six months of this year, Senate Republicans have still not allowed President Obama to match even the record of President Bush's first term. Even with an extra six months, we are still eight confirmations behind where we were at the end of 2004.

The assertion by some Senate Republicans that "there is no difference in how this President's nominees are being treated versus how President Bush's nominees were treated" is simply not supported by the facts. Compared to the same point in the Bush administration, there have been more nominees filibustered, fewer confirmations, and longer wait times for nominees, even though President Obama has nominated more people and there are more vacancies. And while Senate Republicans have taken to comparing President Obama's fifth year to President Bush's fifth year, the fact is that there were fewer confirmations then because we had done such good work in President Bush's first term, in particular the 100 confirmations we achieved during the 17 months in 2001 and 2002 when I was Chairman of the Judiciary Committee. In fact, from June 9, 2005, until October 20, 2005, there were no consensus judicial nominees on the Executive Calendar. So the only reason there have been more votes this year than in 2005 is that, contrary to Republicans' assertions, we have had more nominees this year, mostly because they were held over from last year by Senate Republicans.

While the routine and sustained delays over the past four years are without precedent, Republicans point to June 2004 as the one time that there were a number of President Bush's nominees pending on the floor. I recall that in early 2004, President Bush had bypassed the Senate and recess appointed two controversial nominees to be circuit judges and that around that time we learned that Republican Committee staff hacked into a shared server to pilfer Democratic files. Still, we were able to clear nominations by confirming more than 20 consensus nominees in just one month. There is nothing like that to explain the years of backlogged judicial nominees during this administration.

Context matters. Anyone can point to this example or that example, but when you look at the whole picture, it is clear that President Obama's nominees have faced unprecedented delays on the Senate floor, and that his nominees have been less likely to be confirmed than President Bush's at the same point.

But the context of these statistics also matters. Judicial nominations should not be about partisan tit-for-tat. Judicial vacancies impact millions of people, all across America, who depend on our Federal courts for justice. When you compare the Senate's record from 2001-2005, and from 2009-2013, it is clear that we are not meeting the standard we set for how quickly the Senate can act to fill judicial vacancies. Throughout my career, whether as a prosecutor or as Chairman of the Judiciary Committee, I have fought for justice, and to ensure that people have access to justice and can have their day in court. That is why my recent statements have discussed not only the delays in the nominations process, but also the impact of sequestration cuts on our legal system. I continue to hear from judges and other legal professionals about the serious problems sequestration either has caused, or will cause if we do not fix it.

Chief Justice John Roberts recently noted that sequestration "hit [the judiciary] particularly hard...When we have sustained cuts that means people have to be furloughed or worse and that has a more direct impact on the services that we can provide." I ask that this article, titled "Chief Justice Roberts: Sequester cuts hitting federal judiciary 'hard,'" be printed in the Record at the conclusion of my statement. We should all be doing everything we can to help our coequal branch meet the Constitution's promise of justice for all Americans.

The impact of sequestration on the third branch is compounded by the high level of judicial vacancies. I know we can do better, because we have done better. Each day that Senate Republicans refuse to confirm the qualified judicial nominees who have been reviewed and voted on by the Judiciary Committee is another day that a judge could have been working to resolve disputes. Hardworking Americans should not have to wait years to have their cases decided.

Even if it were true, it is not good enough to say that the Senate is treating President Obama's nominees the same as it treated President Bush's. The real question is whether the Senate is meeting its duty to do everything it reasonably can to ensure the American people have access to justice. When Senate Republicans refuse to make recommendations for nominees, and then delay votes on consensus nominees, they are not somehow hurting the President, they are hurting the American people and our justice system.

Today, Attorney General Phillips will finally be confirmed by the Senate, and there are many more nominees the Senate should consider in the coming weeks. Tomorrow, the Senate Judiciary Committee will hear from James Comey, who President Obama has nominated to serve as FBI Director. Later this week the Committee will begin the process of considering the first of three current nominees to the D.C. Circuit. The Judiciary Committee is also scheduled this week to vote on the nomination of B. Todd Jones to serve as director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. The ATF has been without a Senate confirmed director since 2006. Senate Republicans refused to allow a vote on President Bush's nominee to lead the ATF and I hope they will not attempt to do the same again. Nominees to lead the Labor

Department and the Environmental Protection Agency are also awaiting our consideration. I hope the Senate will be able to come together and confirm these worthy nominees without the delay that has befallen so many nominees in the past four years.

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